No. 96-370

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In The

Supreme Court of the United States

October Term, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,

Petitioner,

vs.

FERBAR CORPORATION OF CALIFORNIA, INC., STEPHEN J. BARNES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

When does the Multiemployer Pension Plan Amendments Act statute of limitations under 29 U.S.C. § 1451 begin to run to collect overdue employer withdrawal liability?

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COUNTER-STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[1] Before the Court is a narrow issue of statutory interpretation: whether the MPPAA authorizes a Plan sponsor to file suit to collect withdrawal liability nearly eight years after the date of a complete withdrawal.

The MPPAA authorizes civil actions to enforce its various provisions and provides in pertinent part:

> (f) An action under the section may not be brought after the later of —
>
> (1) six years after the date on which the cause of action arose, or
>
> (2) three years after the earliest date on which the Plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451.

In the decision below, the court of appeals concluded that the Plan sponsor's action was time-barred. *Board of Trustees, Bay Area Laundry and Drycleaning Pension Trust Fund v. Ferbar Corporation*, 73 F.3d 971 (9th Cir. 1996). Pet. App. 5a. A unanimous Ninth Circuit Court of Appeal held that its prior decision in *Board of Trustees of the Construction Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), was controlling. In *Thibodo*, the Ninth Circuit held that, "For actions to recover withdrawal incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." 34 F.3d at 916-917.

By contrast, the D.C. Circuit held that a plan's cause of action

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1. Public Law No. 96-364, 94 Statute 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461) (1988).

for withdrawal liability does not arise until the employer fails to make a scheduled payment and thus triggers the running of the limitations period under the MPPAA. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1122-1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). Moreover, the Seventh and the Third Circuits disagree as to whether the limitations period runs from the date of the first missed payment or whether there is a separate limitations period that runs from the date of each missed payment. *Cf. Central States Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 172 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994), with *Board of Trustees of the District No. 15, Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994).

In their briefs, Petitioner and the Solicitor General have both provided summaries of the statutory scheme. In our view, however, their treatments are unduly narrow and fail to explain the broader context in which the MPPAA's withdrawal liability provisions operate. We begin, therefore, with a discussion of the backdrop against which Congress legislated and a review of certain features of ERISA. We then explain why the statute of limitations ordinarily begins to run from the date of withdrawal, using the facts of this case to illustrate.

A. General Principles Of Withdrawal Liability.

One of the principal innovations of the MPPAA was to make an employer that withdraws from a multiemployer pension plan liable for a portion of the plan's unfunded vested benefits. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). The statutory scheme discourages employers from withdrawing from an underfunded plan by requiring the withdrawing employer to continue to make contributions to the plan even though its employees will not accrue additional plan benefits. 29 U.S.C. § 1381.

The MPPAA was created to solve the problem of employer flight from multiemployer pension plans after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Statutes 829, 29 U.S.C. § 1001, *et seq.* In *PBGC v. R.A. Gray & Co.*, this Court observed: "As the date for mandatory coverage of multiemployer pension plans approached, Congress became

concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity." 467 U.S. at 720-21. The MPPAA was designed to eliminate the incentives for withdrawal and to strengthen multiemployer plans so that employees and their beneficiaries would not be deprived of anticipated retirement benefits. *Id.* at 722-23.

In *Milwaukee Brewery Workers Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995), the Court explained that the MPPAA:

> [t]ransformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty. That is to say, it imposed a withdrawal charge on all employers withdrawing from an underfunded plan (whether or not the plan later became insolvent). And, it set forth a detailed set of rules for determining, and collecting, that charge.

Id. at 417.

B. Withdrawal.

The statutory mechanism for accomplishing this goal is straightforward and is driven by one fundamental occurrence — the date of the employer's withdrawal. 29 U.S.C. § 1381(a) is titled "Withdrawal Liability Established" and it provides: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

A complete "withdrawal" occurs on the date when an employer either: (1) permanently ceases to have an obligation to contribute under the plan; or (2) permanently ceases all covered operations under the plan. 29 U.S.C. § 1383(a) and (e).

Respondent Ferbar Corporation (hereinafter "Respondent" or "Ferbar") owned three dry-cleaning facilities: Superior French Laundry, One Hour Martinizing, and Diablo Cleaners. Joint Appendix (J.A.) 19. Respondent Stephen Barnes was the principal

owner of Ferbar. Ferbar made contributions to the Bay Area Laundry and Dry Cleaning Pension Trust Fund ("Trust Fund") on behalf of employees working at these three facilities. J.A. 19. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983. J.A. 19.

On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government And Industrial Services Local No. 3. J.A. 19. Ferbar made no contributions to the Pension Trust Fund on behalf of employees working at Superior French Laundry or One Hour Martinizing after March 1985.[2] J.A. 20. After March 1985, the Trust Fund stopped receiving monthly statements and contributions from Ferbar.

C. Initiation Of Collection Proceedings.

The statutory procedure for collection of this liability is also straightforward. 29 U.S.C. § 1382 provides:

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with his part, shall —
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

Inasmuch as the continuing solvency and the continuing growth of multiemployer pension plans were the guiding purposes in the passage of the MPPAA, a number of strict timelines were incorporated into the statute's collection procedures. First and foremost, the fundamental statutory requirement for plan sponsors under the MPPAA is to send a notice and demand for payment to the employer for withdrawal liability "as soon as practicable after

2. It is interesting to note that if the Trust Fund had drawn up the schedule of payment, and demanded payment, "as soon as practicable" after Ferbar's withdrawal, Ferbar's first withdrawal liability payment would have been due on June 1, 1985. 29 U.S.C. §§ 1399(b)(1), 1399(c)(2); *Joseph Schlitz, supra,* 513 U.S. at 419-420.

the employer's complete or partial withdrawal". 29 U.S.C. § 1399(b)(1). Due to Congress' concern about the continued solvency of these pension plans, the directive to act with all due speed is completely logical. This command that plan sponsors demand payment "as soon as practicable" after withdrawal is the very first order Congress gave plan sponsors in the statutory framework for collecting withdrawal liability. *Id.* ("Congress told the trustees of pension funds not to tarry in assessing and collecting [withdrawal] liability.") *Navco, supra,* 3 F.3d at 172.

However, in the instant case, it was not until almost two years after its withdrawal, on December 12, 1986, that the Board of Trustees of the Pension Trust Fund ("Petitioner" or "Board of Trustees") sent a letter to Superior French Laundry titled: "Withdrawal Liability Assessment and Demand for Payment." This letter began as follows:

> Gentlemen:
>
> Our records indicate that you have not contributed to the Bay Area Laundry and Dry Cleaning Pension Fund since March 1985.
>
> Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 (ERISA) . . .

The letter stated that Superior French had a withdrawal liability assessment of $45,570.80. Superior French Laundry was advised that it had two options: (1) it could pay the entire withdrawal liability in a single lump sum payment within sixty (60) days; or (2) it could pay off its withdrawal liability by making monthly installment payments of $345.50 for the next twenty (20) years. Superior French Laundry was told that if it opted to make monthly payments, its first payment would be due on or before February 1, 1987. Superior French Laundry was warned that, if it failed to make any monthly payment (plus interest) within sixty (60) days after receiving notice from the Plan, that the payment would be considered delinquent and the Board of Trustees could then deem Superior French Laundry

to be in default and liable for the entire amount of the withdrawal liability from the due date of the first late payment. Superior French Laundry was also advised it had ninety (90) days to request that the Trustees review any matter relating to the determination of the Company's withdrawal liability and payment schedule, to identify any claimed inaccuracy and to furnish the Trustees with any relevant information. The Plan promised to review any matter raised by Ferbar and to notify the Company of the Plan's decision and the basis for the decision. J.A. 23-26.

D. Payment Of Withdrawal Liability.

In *Jos. Schlitz Brewing Co.*, the Court answered the question as to when an employer must pay withdrawal liability:

> [t]he statute says that a plan must draw up a schedule for payment and "demand payment" as "soon as practicable" after withdrawal. 29 U.S.C. § 1399(b)(1).
>
> It adds that: '[w]ithdrawal liability shall be payable . . . no more than sixty days after the date of the demand.' 29 U.S.C. § 1399(c)(2).

513 U.S. at 419-420.

Section 1399 commands the employer to make withdrawal liability payments in accordance with the schedule "beginning no later than sixty days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule." 29 U.S.C. § 1399(c)(2). Neither Ferbar Corporation nor Superior French Laundry has ever made any withdrawal liability payment to the Pension Trust Fund. J.A. 20.

Requiring employers to make withdrawal liability payments "up front" is consistent with MPPAA's stated goal of protecting the solvency of multiemployer pension plans. *R.A. Gray*, 467 U.S. at 722-23. The purpose of § 1399(c)(2) is directly aimed at protecting the stability and solvency of the pension plan and to cushion the economic shock to the other participating employers created by the sudden withdrawal of an employer. The "pay now, dispute later" feature of the MPPAA functions to preserve plan cash flow and to thwart the use of dilatory tactics by employers.

Robbins v. Pepsi-Cola Metropolitan Bottling Co., 800 F.2d 641, 642 (7th Cir. 1986).

During a sixty-day window of opportunity, a withdrawing employer is entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments, plus accrued interest, if any, without penalty. 29 U.S.C. § 1399(c)(4).[3]

E. Request For Review.

After an employer receives the withdrawal liability assessment notice, 29 U.S.C. § 1399(b)(2)(A) permits the employer to request a review of the initial withdrawal liability determination. In its request for review, the employer may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments; may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer; and may furnish any additional relevant information the employer possesses that could lead the plan sponsor to a reassessment or recalculation of the determination. *Id.*

Superior French Laundry submitted a request for review of its assessed withdrawal liability by letter of February 27, 1987. In that letter, the employer asked to have the Trustees review their determination of withdrawal liability, as the Company believed that no liability could be imposed for the various reasons set forth in the letter the reasons included the fact that, as there was no signed written agreement upon which the requirement to contribute was based, the Employer was not obligated to make any contributions. Superior French also claimed that there were inaccuracies in the Trustees' calculation of the withdrawal liability. Finally, in the alternative, the Company asked that the Trust Fund provide it with a report of all calculations it made, and the assumptions it utilized in determining the unfunded vested benefits and the employer's withdrawal liability. J.A. 31-34.

29 U.S.C. § 1399(b)(2)(B) is the next statutory event. It provides:

---

3. In *Joseph Schlitz*, Schlitz withdrew on August 14, 1981, and by the end of September 1981, the plan had completed its withdrawal liability calculations, created a payment schedule, and had sent out a demand for payment (thereby making the first payment payable on or before November 1, 1981). *Id.*

After a reasonable review of any matter raised, the plan sponsor shall notify the employer of

(i) the plan sponsor's decision

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

There is no time limit on the plan's response, but if the plan sponsor fails to reply within 120 days, the employer is then free to arbitrate the plan's determination pursuant to 29 U.S.C. § 1401(a)(1)(B). The Trust Fund herein never responded to the employer's request for review. J.A. 38.

F. Acceleration.

The statutory scheme next provides that if the employer fails to make, when due, any payment and then fails to cure this failure to pay within sixty days after receiving written notice from the plan sponsor of such failure, then the "plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. § 1399(c)(5).

The Pension Trust Fund next sent Superior French Laundry a letter dated April 14, 1987, advising that since more than sixty (60) days had elapsed from the date of the withdrawal liability assessment letter of December 12, 1986, and since the Trust Fund had no response from the Company, Superior French Laundry was advised of its status as a Delinquent Withdrawn Employer. The letter from the Trust Fund further stated that the failure to make the necessary payment within sixty (60) days would cause the Company to become a "Defaulted Withdrawn Employer", which permits the Board of Trustees to insist upon immediate payment of the entire outstanding amount of withdrawal liability. J.A. 35-36. The Trust Fund advised Ferbar in this letter: "You are required by ERISA to make the necessary payments notwithstanding any request you

may make for review or appeal of the determination of the amount of your liability or schedule of payments." J.A. 36.[4]

G. Initiation Of Arbitration.

Where a dispute exists, either party may initiate arbitration within specified time periods. 29 U.S.C. § 1401(a)(1). If the employer fails to timely initiate arbitration, it waives both its right to dispute the amount of its withdrawal liability and its right to assert defenses. 29 U.S.C. § 1401(b)(1). During the pendency of an arbitration, the employer is obliged to continue making withdrawal liability payments in accordance with the plan sponsor's schedule. 29 U.S.C. § 1401(d). *Carriers Container Council, Inc. v. Mobile Steamship Assoc., Inc.*, 904 F.2d 28 (11th Cir. 1990), *cert. denied*, 498 U.S. 926 (1990). The PBGC has published regulations that establish strict timelines and procedures for MPPAA arbitrations. *See* 29 C.F.R. § 4221.1 – 4221.14.

On July 8, 1987, Superior French Laundry submitted a Notice of Initiation of Arbitration concerning its withdrawal liability, and asked that the Fund contact the Company's attorneys so that they could begin the process of selecting an arbitrator. J.A. 37-38. The Notice of Initiation of Arbitration noted that the employer received no response from the pension fund to its request for review. J.A. 38. However, no arbitration proceedings were commenced. J.A. 29.

Again, if no arbitration proceeding has been initiated, the withdrawal liability amounts are deemed due and owing on the schedule set forth by the plan sponsor. 29 U.S.C. § 1401(b)(1). The plan sponsor is given the right to bring an action in state or federal court to collect the withdrawal liability. *Id.*

H. Filing Of Lawsuit.

29 U.S.C. § 1451 permits a Trust Fund to sue for collection of withdrawal liability. Petitioner did so in the instant case on February 9, 1993. The Trustees sued for the total amount of unpaid

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4. It is noteworthy that the Trust Fund ignored the Company's timely request for review sent on February 27, 1987, and erroneously stated that "we have no response from you." (J.A. 35.)

withdrawal liability payments (First, Second and Third Claims). J.A. 8-11. The Trust Fund also sued for $25,375: "[b]eing the amount of the delinquent monthly installment payments from February, 1987 to the date of filing of this action, and the sum of $345.50 each month thereafter . . ." (Fourth Claim). J.A. 11, 12.

I. Proceedings Below.

The parties filed cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the United States District Court for the Northern District of California entered judgment in favor of Ferbar. Pet. App. 6a-19a.

The United States Court of Appeals for the Ninth Circuit issued a per curiam decision on January 17, 1996 sustaining the judgment of the District Court. On May 13, 1996, the Ninth Circuit issued an Order denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. No judge of the court requested a vote on the suggestion for rehearing en banc. Pet. App. 20a.

SUMMARY OF ARGUMENT

A. This case ultimately asks the Court to answer a very straightforward question: Do withdrawal liability disputes ever end? Respondents will demonstrate below that the statute of limitations found at 29 U.S.C. § 1451(f) answers this question with a resounding "yes"! In order for such disputes to end within a reasonable time, however, the cause of action must be deemed to arise on the date of withdrawal.

Under Petitioner's theory, on the other hand, these disputes may not end because withdrawal liability claims do not "accrue" until three preconditions are met: (1) the Trust Fund calculates the amount of the employer's withdrawal liability; (2) the Trust Fund notifies the employer of this assessment; and (3) the Employer fails to pay and then fails to cure the default within sixty (60) days. Petitioner argues that if any of these preconditions are not met, the statute of limitations does not begin to run.

Respondents assert that applying these preconditions to the running of the limitations period is unnecessary and contrary to

the plain language of 29 U.S.C. § 1451, the purposes of ERISA, and common sense. The three or six-year statute of limitations found at 29 U.S.C. §§ 1451(f)(1) and (2) have a plain and unambiguous meaning with regard to the dispute presented here — Petitioner knew in March 1985 that Ferbar had completely withdrawn but waited until February 1993 to file suit to enforce its rights. It knew of the existence of the cause of action in March 1985 when it arose, and the statutory language requires that the Trust Fund's cause of action begins to run from that time.

Adoption of the Board of Trustees' view on the accrual of the cause of action and the commencement of the running of the statute of limitations in Multiemployer Pension Plan Amendment Act cases — not until the amount of liability and the payment schedule are imposed and a payment is missed — would also turn the long-standing principles enunciated by the Court concerning statute of limitations on their head. It would abrogate the clear language of the statute that a fiduciary may bring an action whenever it is adversely affected by an act or omission of any party. 29 U.S.C. § 1451(a). The "act or omission" that is the focus of the MPPAA is an employer's "withdrawal." The very first section of the statute, 29 U.S.C. § 1381(a), describes "withdrawal liability" as the harm the statute is aimed at preventing. The harm arises when an employer withdraws and thereby economically injures the underfunded multiemployer pension plan by saddling the pension plan with unpaid-for pension liabilities. The fact that the trust fund must first calculate the amount of the harm and demand payment prior to filing suit does not mean the harm has not yet occurred. Certainly, a trust fund is adversely affected when an employer withdraws as it ceases making monthly contributions which go to fund vested benefits and to reduce unfunded benefits. The Trust Fund was injured when Ferbar stopped making contributions to the Plan. The fact that this economic injury continued for almost two years before the Trust Fund got around to calculating the amount of Ferbar's withdrawal liability and demanding payment does not change this fundamental fact.

Petitioner's view would give total control to plaintiffs in determining the commencement of the statute of limitations, and

would subject defendant employers indefinitely to withdrawal liability actions. A plaintiff should not be able to postpone indefinitely the commencement of the running of the statute of limitations. Trust funds could literally sit on their rights for many years without starting the withdrawal liability collection process. Uncertainty would reign as employers would never know when they could be hit with withdrawal liability assessments which often are of immense financial magnitude. By permitting the arbitrary reconfiguration of the statute of limitations to benefit the Trust Funds, the Court would extract from the statute the very thing for which statutes of limitation were devised — certainty. If the statute does not begin to run until a trust fund gets around to calculating and imposing liability and a demanded payment is not made, the goal of the Act to protect the solvency of multiemployer pension plans would be rendered a nullity.

The six years provided in § 1451(f) is clearly a long time. Moreover, the very first command that Congress gave plan sponsors in the MPPAA was that they notify the employer of the amount of the schedule and set forth a demand for withdrawal liability payment "as soon as practicable" after the withdrawal. 29 U.S.C. § 1399(b)(1).

Although Petitioner ignores the portion of the statute dealing with the time a party knows or should have known of the existence of the cause of action, the methodology of requiring plaintiffs to protect their rights once they "know or should have known" of the injury giving rise to the harm is found in the text of § 1451 and is used in other causes of action arising under ERISA. Section 1451(f) provides that a suit must be brought after the *later* of six years from the date on which the cause of action arose or three years after "the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." Thus, the plain text of § 1451(f)(2) gives meaning to when the statute of limitations begins to run under § 1451. When a plaintiff knows it has a cause of action as of a date certain, as was the case here, § 1451(f)(2) generally serves to start the running of the three-year statutory clock at that time. If knowledge of the cause of action is acquired, as in the instant case, within three years from the time the cause of action arises, the time to bring suit is extended under

§ 1451(f)(1) to six years from the time the cause of action arose. Where the statutory language "has a plain and unambiguous meaning" as here, and where the "statutory scheme is coherent and consistent," this Court's inquiry must end. *Robinson v. Shell Oil Company*, __ U.S. __, 117 S. Ct. 843, 846 (1997).

Under Petitioner's interpretation, 29 U.S.C. § 1451(f)(2) would be rendered meaningless in most withdrawal liability collection cases. It is implausible to believe that Congress intended to have one of the two prongs of the statute of limitation for withdrawal liability rendered null and void for the overwhelming number of withdrawal liability cases. The statutory language nowhere suggests a purpose to swallow up the three-year and six-year § 1451(f)(2) limitations so as to render them meaningless for withdrawal liability purposes.

This "knew or should have known" methodology is repeated throughout ERISA's enforcement provisions. Thus, even if this Court should find the language of § 1451(f) ambiguous, the meaning proposed by Respondents is most in accord with its statutory context and the ordinary usage of the language, and it is most compatible with the surrounding body of law into which the provision must be integrated.

Moreover, participants, beneficiaries and employers would be left without a remedy if they seek to enforce their rights under § 1451. Such persons could never sue to compel trustees to commence an enforcement action, as they would always be met with the position that the cause of action had not yet accrued because withdrawal liability no missed payment had yet occurred.

Respondents will also show that the statute effectively creates two separate statutes of limitations for two different types of withdrawal liability obligations. 29 U.S.C. § 1451(f) permits a trust fund to file its suit for withdrawal liability within three or six years. 29 U.S.C. § 1451(b) simply provides that once an employer begins making withdrawal liability payments but then ceases, the trust fund can enforce the employer's installment payment obligation by bringing a collection action in accordance with 29 U.S.C. § 1145. Hence, there is no validity to the Petitioner's contention that installments unpaid six years from withdrawal would be uncollectible.

B. Petitioner and the Solicitor General also argue that each of the payments found in the Plan Sponsors' 20-year withdrawal liability schedule itself contains its own 6-year statute of limitations. There is, of course, nothing in the plain language of § 1451(f) nor in MPPAA's legislative history that hints at this interpretation. More importantly, according to the Trust Fund's limitation theory, the 20-year statutory payment schedule would give the Trust Fund 26 years from the date of the first missed payment before it had to sue on the last missed payment. As Judge Easterbrook observed in *Navco*, 3 F.3d at 172: "Turning six years into twenty-six years is a job best left to magicians." Petitioner's interpretation would require no less than a wholesale rewriting of § 1451 to incorporate selected provisions of § 1399. There is no mention of this borrowing requirement nor of the 20-year recovery period in 29 U.S.C. § 1451. To insert this requirement in § 1451 would wreak a kind of linguistic havoc.

Petitioner's assertion that the statute of limitations runs *seriatim* from the date of each missed payment is mistaken. The application of Petitioner's "continuing violation" theory founders on the plain language of 29 U.S.C. § 1451(f)(2). If the "continuing violation" theory (which gives rise to the 26-year limitations period) is as broad as Petitioner suggests, the "actual knowledge" provision in § 1451(f)(2) would be rendered superfluous and no withdrawal would ever grow stale so long as it remained unremedied. Obviously, Ferbar did not accept the Trust Funds' offer to make monthly payments, and, notwithstanding Petitioner's hyperbole, the underlying obligation cannot properly be termed a loan or installment obligation. Petitioner's analogies to the law of commercial contracts are misplaced as Respondents never agreed to the process by making any payments.

Petitioner's 26-year statute of limitations argument is based on a false premise. Although Petitioner asserts that the statute "commands" payment according to this 20-year schedule, its own acts and words belie this contention. J.A. 24-25, 35. What the statute does command is that the Trust Fund inform the withdrawing employer that the employer be given a choice to either pay the entire amount in one lump sum or pay the withdrawal liability amount according to a schedule. *See* 29 U.S.C. § 1399(c)(4).

Importantly, Petitioner chose to accelerate the debt when it filed suit here.

Petitioner's interpretation would upset the balance between ERISA's regulation of benefit plans and the costs of compliance. There is, of course, a tension between the primary ERISA goal of benefiting employees and the subsidiary goal of containing pension costs. Petitioner's borrowing of selected parts of § 1399 to extend the limitations period for up to 26 years would effectively establish a new remedy that Congress did not expressly provide.

Petitioner has thrown down the gauntlet of "as soon as practicable" as the statute's enforcement mechanism, without hinting at what it means. Without any reliable yardstick to measure "practicable," virtually all withdrawal liability assessments would be placed in dispute. Moreover, Petitioner's proposed enforcement mechanism is impractical, would invite more litigation and would provide no meaningful remedy for harmed participants.

ARGUMENT

I. THE CAUSE OF ACTION ARISES ON THE DATE OF WITHDRAWAL, AND A COLLECTION LAWSUIT CANNOT BE BROUGHT AFTER THE LATER OF SIX YEARS FROM THE TIME THE CAUSE OF ACTION AROSE OR THREE YEARS AFTER THE TRUST FUND ACQUIRES KNOWLEDGE OF THE EXISTENCE OF THE CAUSE OF ACTION.

In *Board of Trustees of the Construction Laborers Pension Trust v. Thibodo*, the Ninth Circuit held that the limitations period of § 1451(f) begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met. *Thibodo*, 34 F.3d at 917. The court noted that its approach differed from that of the D.C. Circuit which did not allow the statute of limitations to commence running until there was an unmet demand for payment. The court said that "that approach improperly places the running of the limitations period in the control of the plaintiff." *Id.* at 917. The court pointed out that, theoretically, the statute of limitations might not be triggered for many years should it be left in the control of plaintiff. Moreover, it reasoned that there would be little reason for § 1451(f)(2), if the cause

of action did not come into existence until the demand for payment was made and refused. *Id.* at 918.

While *Thibodo* involved the construction industry, its principle concerning commencement of the running of the statute was adhered to in the Ninth Circuit's decision below. The Ninth Circuit held that the limitations period begins to run on the date of complete withdrawal. Pet. App. 25a-26a.

A. The Statute Expressly Provides That A Fiduciary May Bring An Action Whenever It Is Adversely Affected By An Act Or Omission Of Any Party, And Trust Funds Are Harmed By Failure Of Withdrawn Employers To Make Their Monthly Contributions.

The provisions of the Multiemployer Pension Plan Amendments Act setting forth the statute of limitations cannot be any clearer — fiduciaries can bring an action whenever they are adversely affected by an act or omission of any party. 29 U.S.C. § 1451(a).

It cannot reasonably be controverted that a trust fund is adversely affected when an employer withdraws and thereby ceases making its pension contributions to the fund. That cessation determines when a fund is adversely affected in the first instance, not when a payment has been missed. It is at that point that a fund suffers clear financial detriment — less money to fund vested benefits and to reduce underfunding is flowing in.

The harm arises when an employer withdraws and thereby economically injures the underfunded multiemployer pension plan by saddling the pension plan with unpaid-for pension liabilities. The fact that the trust fund must first calculate the amount of the harm and demand payment prior to filing suit does not mean the harm has not yet occurred.

Under the Board of Trustees' approach, a trust fund could delay, and effectively deny the existence of, withdrawal liability for an unlimited period of time — until it got around to assessing liability and demanding payment. It waited almost two years in the instant case. Was not the Fund adversely affected by then? Would not the underfunding problem be made more acute by the withdrawing employer's failure to contribute? Petitioner cannot plausibly argue

that a fund would not be harmed if it waited six, ten or twenty years. Yet, under its theory no cause of action would accrue (and it purportedly would not be adversely affected) if it waited until that time to demand payment.

The Board of Trustees contends that a right of action would not be complete on the date of withdrawal so the limitations period could not begin to run at that time. It argues that the amount of liability would not yet be calculated or a demand for payment made, and hence a suit to collect liability could not be maintained. Ferbar submits, first of all, that § 1451 states that a fiduciary which is adversely affected by an act or omission of another party may bring an action, and thus a fund could do so at the time of withdrawal as it is adversely affected at that point.

In *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), the Court interpreted the Portal to Portal Act's two-year statute of limitations to mean that a cause of action accrued for liquidated damages from an employer employing child labor when the minors were actually employed, not when it was administratively determined that the employer was liable for such damages. The failure to pay the minor caused the harm irrespective of the fact that it had not yet been administratively determined that the employer was liable. The Court said:

> The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed, [citations], is a matter of judicial administration and of no relevancy here.

Unexcelled Chemical Corp., 345 U.S. at 66.

Likewise, under the Multiemployer Pension Plan Amendments Act, the time of actual withdrawal should determine the accrual of the cause of action, and not the time when the employer fails to meet an actual assessed liability payment. The withdrawal causes the cessation of the contribution flow to the fund thereby causing it to be adversely affected. The fact that a court may have to stay its hand until the administrative procedure under the Act is completed is a matter of judicial administration, and does not trump the reality that a fund is adversely affected when an employer's contributions cease.

The Board of Trustees argues that a limitations period accrues only when the right of action is complete, that is, when it has accrued in a shape to be effectively enforced. Petitioner's Brief, 14. It then cites *Amy v. Dubuque*, 98 U.S. 470, 474 (1879) and *Wilcox v. Executors of Plummer*, 29 U.S. 172, 181 (1830), for the correct proposition that the statute of limitations begins to run from the time the action first could have been instituted. Section 1451(a) clearly determines that time for purpose of the instant case — the action could have been instituted from the time that the trustees were adversely affected by an act or omission of a party, *i.e.* when an employer withdraws.

Both Petitioner and the Solicitor General rely heavily on *Rawlings v. Ray*, 312 U.S. 96 (1941),[5] which held that the cause of action was not complete and present at the date of assessment of liability but until the date fixed for payment. However, in *Rawlings*, while the applicable state statute of limitations spoke in terms of accrual of a cause of action, the federal statute on which the liability was based did not expressly set forth when a suit to enforce the liability could be brought (unlike the statute at issue). In the instant case, § 1451 expressly states that a fiduciary can bring an action when it is adversely affected.

The Board of Trustees maintains that until there is some act or omission by the employer contrary to some statutorily-imposed

5. Both Petitioner and the Solicitor General also rely on *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). *Crown Coat* is inapposite. It held that under the statute at issue, the statute of limitations accrued at the time of final administrative action. There is no similar administrative action contained in the instant statute, and, in any event, under the ERISA benefit claims statute, 29 U.S.C. § 1132(a)(a)(B), the cause of action accrues when the claim for benefits is denied, not when the administrative review process has been completed. *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984). Likewise, *United States v. Wurts*, 303 U.S. 414 (1938), is cited by Petitioner for the proposition that the right of action is complete when it has accrued in a shape to be effectively enforced. Respondents submit that the right to recover withdrawal liability may be effectively enforced at the time of withdrawal as, under § 1451(a), the fund is adversely affected as of that time. Moreover, it clearly may be enforced once the fund becomes aware of the withdrawal — all that the fund has to do is calculate the liability, give notice to the employer and make a demand.

obligation, no injury to the Plan occurs and no suit can be filed.[6] Petitioner's Brief, 15. Ferbar again submits that a plan is adversely affected by the mere act of withdrawal. 29 U.S.C. § 1381(a). While it is correct that an employer owes nothing until its plan demands payment, that is not the controlling factor for cases under the MPPAA as to when the cause of action accrues. The governing factor must be when the rights of the plan's participants and beneficiaries are adversely affected.[7] That is when the statute declares the right of fiduciaries to maintain a suit arises and that is when the cause of action accrues. The statute places the burden on the trustees on the trustees to take the necessary steps "as soon as practicable after an employer's complete or partial withdrawal" to enforce collection. 29 U.S.C. § 1399(b)(1). This statutory obligation is in furtherance of one of the MPPAA's goals which is to maintain level funding for the plan. *Jos. Schlitz*, 513 U.S. 419.

In *Unexcelled Chemical*, 345 U.S. at 66, the Court held that the statutory liability accrued when the minors were employed and not paid, and it was from that date that the period of limitations began to run. Although Petitioner argues that it would not be clear prior to the time that a fund gives notice of the imposition of withdrawal liability what the amount of withdrawal liability is or if withdrawal liability is even owed, the same could be said of the situation in *Unexcelled Chemical*. An employer may not know whether an employee is covered under the Portal-to-Portal Act or whether it has an obligation to pay pursuant to that Act. Moreover, the amount that should be owing is not clear at the point that an employee is not paid the proper amount. Just as the cause of action would accrue in that situation at the time when the employee was not paid, and not until the time an administrative determination that the employer is liable is made, so under the MPPAA should

6. It should be noted that in *Joyce*, a case heavily relied on by Petitioner, the Trust Fund sued for the entire amount of withdrawal liability on the same day it sent notice to the employer of its withdrawal liability and payment schedule. *Joyce*, 871 F.2d at 1121.

7. "[I]f an employer withdraws from a . . . multi-employer plan, it incurs 'withdrawal liability' in the form of a fixed and certain debt to the pension plan." *R.A. Gray & Co.*, 476 U.S. at 725. *Concrete Pipe & Products v. Construction Laborers Pension Trust For S. Calif.*, 508 U.S. 602 (1993).

the cause of action at the very latest accrue on the date the Trust Fund knows or should have known of the withdrawal, even though the precise amount of the debt may not have been administratively determined.

B. The Adoption Of Petitioner's Position Would Allow Trust Funds To Be In Absolute Control Of The Commencement Of The Running Of The Statute Of Limitations, And The Goal Of Certainty, Which Statutes Of Limitations Are Created To Establish, Would Be Vitiated.

A plaintiff should not be able to postpone indefinitely the commencement of the running of the statute of limitations. *McMahon v. United States*, 342 U.S. 25, 27, *rehearing denied*, 342 U.S. 899 (1951). An interpretation of a statute purporting to set a definite limitation on the time of bringing an action which leaves defendants subject indefinitely to legal actions would defeat its obvious purpose. *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926). The very purpose of a period of limitation is that there may be, at some definitely ascertained period, an end to litigation. *Reading Co. v. Koons*, 271 U.S. at 65.

Ferbar legally ceased making contributions to the Pension Trust Fund in March 1985 thereby clearly withdrawing from the Plan. 29 U.S.C. § 1383(e). The Board of Trustees waited almost two years, until December 1986, to issue a notice of assessment of withdrawal liability. In the initial withdrawal liability assessment demand letter, the Trust identified March 1985 as the date of Ferbar's withdrawal. J.A. 23. The Board ignored and did not respond to Ferbar's timely request for review of the determination and calculation of withdrawal liability and request for documentary information. It then ignored Ferbar's timely Initiation of Arbitration of the dispute. Although Ferbar failed to make its first scheduled liability payment on February 1, 1987, and made no payment thereafter, the Board of Trustees did not move to file suit for collection until February 9, 1993, almost eight years from the date of withdrawal.

The Board of Trustees should not be rewarded for sitting on its legal rights and now be permitted to collect withdrawal liability through an interpretation of the statute that gives it the unfettered

discretion when to commence the assessment/collection process. The plain meaning of the governing statute, 29 U.S.C. § 1451(a), should be recognized — Plan trustees may bring suit when a plan is adversely affected, and that occurs at the time of withdrawal when the obligation to contribute permanently ceases.

This Court long ago enunciated the basic principles that

> The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights and shutting out stale and fraudulent claims. It has, therefore, always been construed strictly against the plaintiff, and no case has been excepted from its operation, unless within the strict letter or manifest equity of some exception in the act itself. *Shipp et al. v. Miller's Heirs*, 2 Wheat. 316, 324 (1817).
>
> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of state claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349, 64 S. Ct. 582, 586, 88 L. Ed. 788. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 428 (1965); *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945).

Employers would be left completely at the mercy of the whims of trust fund trustees, and unable to plan their financial futures, if the trustees, at their absolute discretion, could decide when to assess withdrawal liability, and demand and enforce payment. Despite Petitioner's claim that trustees would, of course, work to promptly

assess liability and enforce collection, there can be no guarantee that they would do so unless there were some overarching direction that would so compel them.

In *Reading Co. v. Koons*, the issue was whether a cause of action accrued at the date of death or when an administrator was appointed. In determining that it should run from the time of death, the Court reasoned that the time might have been extended indefinitely by the failure to apply for administration. *Reading Co. v. Koons*, 271 U.S. at 64.

Under the Board of Trustees' view there would be no legal bar to prevent a fund from waiting for, say, twenty years and then demanding payment. It could in fact even go up to twenty-six years and then attempt to recover whatever amount of payment it could. The Trustees would actually countenance the loss of numerous years of collection by a fund which failed to act in a timely fashion and instead delayed imposing the assessment and recovering the payments. Adoption of Petitioners standard would reward sloth and inadvertence.

The Board of Trustees slept on its rights in this case. It ignored the Employer's request for review and for arbitration. It made a dilatory attempt to assess and collect liability, waiting almost eight years from the time of withdrawal to commence suit. The Board is now attempting to institutionalize an interpretation of 29 U.S.C. § 1451 that would give it and other trust funds the power to utterly ignore the valid requests of employers for review of assessments and to commence the running of the statute at their total discretion. Only by recognizing Congress' clear language that a fiduciary can bring suit when it has been adversely affected, *i.e.* at the time of withdrawal, can pressure be brought on funds to act with dispatch and with fairness in collecting sums intended for beneficiaries.

Moreover, withdrawn employers would never be able to plan their business and financial futures with any degree of certainty if they never could be certain if they would be assessed withdrawal liability, what the amount of that liability might be and when they might be required to pay that amount. They would be subject to a timetable for the collection of withdrawal liability left to the absolute discretion of fund trustees. This total uncertainty as to whether or

when enforcement of liability might be made against them is just the sort of uncertainty that statutes of limitation are designed to prevent.

C. Petitioner's View Would Allow Trust Funds To Control And Delay The Recovery Of Withdrawal Liability Amounts In Derogation Of The Statute's Goal Of Maintaining Solvency Of Trust Funds And The Congressional Directive To Act As Soon As Practicable.

The six years provided in § 1451 is clearly a long time.[8] Certainly trust funds should be able to make the necessary withdrawal liability calculations and provide a schedule of payments to the withdrawn employer well within that time frame. In fact, Congress has exhorted trust funds to act rapidly by mandating that they notify the employer of the amount of liability and the schedule of payments and demand payment "as soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. § 1399(b)(1).

Allowing trustees to delay their assessment and collection efforts would be in derogation of the acknowledged important goal of the MPPAA of maintaining the solvency of multiemployer trust funds, *R.A. Gray & Co.*, 467 U.S. at 720-25, and a fund's dilatoriness could cause its solvency to be jeopardized. Moreover, such delays by trustees would certainly not be in the best interests of the fund beneficiaries.

The concept of withdrawal liability stems from a Congressional concern that ERISA did not adequately protect pension plans from the adverse consequences that resulted when employers terminated their participation in pension plans, which threatened the solvency and stability of both the multiemployer plans and the newly formed Pension Benefit Guaranty Corporation ("PBGC"). *R.A. Gray & Co.*, 467 U.S. at 722-23. The policy reason underlying the numerous time constraints built into the statute (requiring Trust Funds to act with dispatch) was to ensure the financial viability of these pension plans. *Id.* Failing to collect

8. The very first statute of limitations was for a six-year period. "To avoid cutting off the rights of those who had relied upon existing law, their remedies were preserved if they took action before the Feast of Ascension in 1546, a period of six years." Ferguson, William D., *The Statutes of Limitations Saving Statutes*, The Michie Company, 1978.

withdrawal liability over long periods of time requires the other contributing employers to make up any shortfall. *Id.* Higher contribution rates engendered by these shortfalls would be required to maintain current levels and therefore discourage employers from participating in these plans. *Id.* A failure to attract new employers to the multiemployer plan further weakens the pension plan. Moreover, delay jeopardizes the collection of withdrawal liability. Employers over time may go out of business, move, sell the business, go bankrupt, reorganize, or relocate out of the geographical area.

Adoption of Petitioner's position would not be in accord with the statutory directive to commence collection efforts as "soon as practicable" following the plan sponsor's determination that a withdrawal has occurred. Trust funds could delay their efforts to collect withdrawal liability with no meaningful sanction. On the other hand, encouraging trust funds to act with dispatch by commencing the running of the statute of limitations at the time of withdrawal would avoid situations, such as the instant case, where the employer has gone out of business or its assets have otherwise dissipated, and would thus enhance the efforts of trust funds to collect all owed withdrawal liability amounts.

D. The Plain Meaning Of 29 U.S.C. § 1451(f) Is That The Statute Of Limitations Generally Runs From The Date The Fund Knows Or Should Have Known Of The Existence Of The Cause Of Action.

In *Robinson v. Shell Oil Company*, the Court held:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *United States v. Ron Pear Enterprises, Inc.*, 489 U.S. 235, 240, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989); *see also Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149-1150, 117 L. Ed. 2d 391 (1992).

> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S. Ct. 2589, 2594-2595, 120 L. Ed. 2d 379 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S. Ct. 1737, 1740, 114 L. Ed. 2d 194 (1991).

117 S. Ct. at 846.

The "act or omission" plainly referenced at § 1451(a) is required to arise "under this subtitle with respect to a multiemployer plan. . . ." The statutory provisions pertaining to withdrawal liability are included in the same subtitle (E) in which § 1451 is contained. The statute directs that an action may not be brought after the *later* of "six years after the date on which the cause of action arose" (29 U.S.C. § 1451(f)(1), *or* "three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action". § 1451(f)(2)). Reading § 1451(f) as a whole, when a plaintiff acquired or should have acquired knowledge forms the starting point for the running of the three-year statute of limitations period. If a plaintiff has knowledge of the existence of the cause of action at the time the cause of action arises, then the plaintiff has six rather than three years to sue. This is because the statute does not permit the plaintiff to bring an action after the *later* of: (1) six years from the date the claim arose; or (2) three years after the earliest date plaintiff knew or should have known of the existence of the claim. If a plaintiff does not know of the existence of the cause of action until more than three years from the time it arose, then the plaintiff has only three years from the earliest date it knew or should have known to sue.

The facts of this case are illustrative: (1) Ferbar withdrew in March 1985; and (2) in December 1986 the Trust Fund wrote Ferbar and acknowledged that Ferbar completely withdrew from the Trust Fund in March 1985. Under 29 U.S.C. § 1451(f)(2), the "earliest date on which" the Trust Fund knew or should have known of the existence of a withdrawal liability cause of action was March 1985

when Ferbar ceased making contributions. The latest date on which the Trust Fund could sue was six years from the March 1985 date on which the cause of action arose. § 1451(f)(1).[9] The Trust Fund's actual knowledge of the existence of the cause of action in March 1985 means that but for the statute's "later of" modifier (and the six year limitations period found at § 1451(f)(1)), its claim would have expired in March 1988 (pursuant to § 1451(f)(2)). Simply put, the six year limitation period found at § 1451(f)(1) gave the Petitioner a three-year "bonus" timeperiod (beyond the initial three year period provided at 29 U.S.C. § 1451(f)(2)) to bring such a claim.

In fiduciary breach claims arising under 29 U.S.C. § 1113(2) of ERISA, the courts have explained that the statutory period begins to run "not when a violation or breach occurs, but when the person harmed acquires 'actual knowledge' of the occurrence." *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). *Rush v. Martin Petersen Co., Inc.*, 83 F.3d 894, 896 (7th Cir. 1996).

As Judge Posner explained in *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996):

> ERISA's statute of limitations for suits against fiduciaries does not begin to run at the time of injury, but instead (unless the "fraud or concealment" provision is invoked, giving the plaintiff additional time) at the time that the prospective plaintiff acquires actual knowledge of the breach of fiduciary obligation, which may precede any injury. [Citations omitted.]

83 F.3d at 853. This rationale supports Respondents' position that the statute generally begins to run when the Fund knows of the existence of the cause of action.

"[T]he starting point for interpreting a statute is the language of the statute of itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). As is explained in Section I, E, *infra*, Petitioner would write § 1451(f)(2) out of the

9. In the instant case, the Trust Fund knew at the same time when the cause of action arose and of the existence of the cause of action. The statute of limitations began to run at the same time under both (f)(1) and (f)(2).

statute for withdrawal liability collection cases. "Absent a clearly expressed legislative intention to the contrary [a statute's] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission*, 447 U.S. at 108. "The 'strong presumption' that the plain language of the statute expresses Congressional intent is rebutted only in 'rare and exceptional circumstances'." *Ardestani v. INS*, 502 U.S. 129 (1991) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Where the statutory text is clear, the burden on a party proposing a statutory interpretation at odds with the text is "exceptionally heavy." *Union Bank v. Wolas*, 502 U.S. 151 (1991).

E. Adoption Of Petitioner's Theory Would Render § 1451(f)(2) Meaningless For Withdrawal Liability Purposes.

ERISA is a "comprehensive and reticulated statute," the product of a decade of Congressional study of the Nation's private employee benefit system. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

Section 1451(f) provides that an action may not be brought under the section after the later of: (1) six years after the date on which the cause of action arose, or (2) three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action. One of the basic purposes of § 1451(f)(2) is to provide a starting date for the accrual of the statute of limitations. It does this, in the same manner as other ERISA enforcement provisions, by stating that the statute of limitations begins to run when the plaintiff "knew or should have known" of the existence of the cause of action. Petitioner's interpretation that a cause of action arises under § 1451(f) only after the Trust Fund has met the requirements of § 1399(b)(1) would render the "knew or should have known" requirement at § 1451(f)(2) meaningless.

Under Petitioner's version, § 1451(f)(2) could have no operative effect for collection of withdrawal liability purposes. Once a Trust Fund calculated liability and notified the employer, the Fund would have had to know that a cause of action existed. At the time the employer failed to pay (which triggers the running of the statute under Petitioner's theory), the Fund would have already

had knowledge. However, under Petitioner's theory, that knowledge is irrelevant, thereby rendering (f)(2) irrelevant for virtually every withdrawal.

Petitioner's interpretation would also render the second statutory time period found at § 1451(f)(2) inapplicable to employer withdrawals. The second limitation period in § 1451(f)(2) provides: "except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action." If a cause of action only "accrues" (according to Petitioner) when Plaintiff gets around to making a demand for payment and the employer fails to pay, the statutory language dealing with fraud or concealment is unnecessary. Under Petitioner's approach, when a plaintiff discovers a fraud or concealment, a plaintiff would calculate and impose the liability on the employer. It would then have six years to bring suit from the time of the first missed payment. The six year provision in (f)(2) would have no meaning.

Using the date of withdrawal as the starting point for the running of the statute of limitations gives meaning to all three time periods described at § 1451(f). An employer's withdrawal is the central event that drives the statutory framework. In short, the only circumstance under which § 1451(f)(2) could be given effectiveness for purposes of collection of withdrawal liability is if the statute of limitations began at the time the Trust Fund knew or should have known of the withdrawal.[10]

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10. Respondent submits that the court in *Joyce* improperly analyzed the facts before it. That case involved a construction industry employer which ceased doing business under the name "Sandoz" and stopped making contributions to the fund in 1981. Unbeknownst to the Fund, Sandoz continued in business under a different name. (*See* Amicus Brief of John T. Joyce, *et al.*, p. 10.) The fund did not discover these facts until 1987, and then assessed liability. The court in *Joyce* solely considered whether the date of withdrawal (1981) or the date of the first missed payment should control for the purposes of the running of the statute. In fact, the court should have applied § 1451(f)(2) and found that the trust fund had six years from the 1987 date when it acquired knowledge of the existence of the cause of the "fraud and concealment" to file its suit. That was when it first knew with certainty that there had been a withdrawal under § 1383(b)(2)(B)(i), *i.e.* that the employer ceased to have an obligation to contribute but continued to

(Cont'd)

Although Petitioner and the Solicitor General maintain that § 1451(f)(2) would have meaning for certain narrow purposes other than collection of withdrawal liability[11], it is uncontroverted that it would not have meaning for withdrawal liability collection purposes should Petitioner's position be adopted. Section 1451(f) is the governing statute of limitations for withdrawal liability. Certainly Congress could not have carved out one of the two prongs of the governing limitations statute for most withdrawal liability situations. This Court has said: "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463 (1975).

Petitioner's interpretation also violates the well-settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect. *United States v. Nordic Village.*, 503 U.S. 30, 36 (1992); *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 103 (1989). Congress did not say that (f)(2) applies for every other possible action under Subtitle E except for the collection of withdrawal liability, nor did it say that only (f)(1) applied to withdrawal liability collection actions. This Congressional silence in the statute can only mean that Congress intended § 1451(f)(2) to apply to all actions that might be brought under Subtitle E, including collection of withdrawal liability.

(Cont'd)

perform work in the jurisdiction. Such an interpretation would breathe life into § 1451(f)(2) for withdrawal liability collection purposes as Congress must have intended. The court's discussion of § 1383(b)(2)(b)(ii), where an employer resumes covered work within 5 years, is dicta as it did not apply to the facts in *Joyce*. However, even under that scenario, the governing provision would be § 1451(f)(2) for a fund that was not aware of the employer's resumption of work.

11. Section 1451(f)(2) clearly encompasses the "more complicated" withdrawal liability questions such as sale of assets, change of corporate structure, suspension of contributions during a labor dispute as it provides for the commencement of a three year limitation period after the trust fund knows or should have known of the existence of the cause of action.

F. Respondents' Interpretation Is Most In Accord With The Surrounding Body Of Law.

The Trust Fund was injured when Ferbar stopped making contributions to the Plan. The fact that this economic injury continued for almost two years before the Trust Fund got around to calculating the amount of Ferbar's withdrawal liability and demanding payment does not change this fundamental fact. Indeed, most economic injuries are inchoate when they occur. For example, when compensation is sought for personal injury such as pain and suffering, lost earning capacity, or medical expenses, the limitations statute begins to run from the date of the accident. *Eisenberg v. Insurance Company of North America*, 815 F.2d 1285, 1292 (9th Cir. 1987); *Sharpe v. Seaboard Coastline Railroad Company*, 528 F.2d 546, 547 (5th Cir. 1976); Corman, "Limitation of Actions," § 7.4.a, pp. 571-72 (1991).

Similarly, claims for benefits brought pursuant to 29 U.S.C. § 1132(a)(1)(B) "accrue" at the time the claim is denied. A participant whose claim for benefits has been denied is required under ERISA to exhaust the plan's internal administrative remedies before suing to protect his or her rights. *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980); *Diaz v. United Agricultural Employee Welfare Benefit Plan*, 50 F.3d 1478, 1483 (9th Cir. 1995). The fact that the plan's internal review mechanism may take six months or more does not toll the statute of limitations. *Chilcote v. Blue Cross & Blue Shield*, 841 F. Supp. 877, 881 (E.D. Wis. 1993). The plan participant's "harm" occurs or accrues when the claim for benefits is denied, not when the administrative review process has been completed. *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501.

Moreover, the concept of knew or should have known has been used to determine the time at which other causes of action arise under ERISA. For example, in *Northern California Retail Clerks Unions v. Jumbo Markets*, 906 F.2d 1371 (9th Cir. 1990), a suit for underpayment of pension contributions, the Ninth Circuit explained that the accrual of the cause of action occurs when the plaintiff, "knows or has reason to know of the injury that is the basis of the

action." *Id.* at 1372. Claims arising under 29 U.S.C. § 1140 for interference with protected rights also accrue on the date the plaintiff knew or should have known that the adverse employment decision was communicated and not on the date on which the adverse employment action was taken. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1140 (7th Cir. 1992).[12] 29 U.S.C. § 1303 gives the PBGC authority to sue to enforce the provisions of Title IV of ERISA and provides that same type of limitations period as is found at § 1451(f). The "knew or should have known" methodology is employed therein. 29 U.S.C. § 1303(e)(6)(b)(i).

29 U.S.C. § 1113 describes the limitation period for breach of fiduciary duty claims. Like 29 U.S.C. § 1451(f), it contains a three-part limitations period. Unlike § 1451, however, the § 1113 three-part limitation period ends after the *earlier* of:

> (1) Six years after (A) the date of the last action which constituted part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> (2) Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Thus, even if the Court were to consider § 1451(f) ambiguous, it is rendered clear based on the fact that its meaning as asserted by Ferbar would be consistent with the other parts of ERISA.

> [T]he meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can

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12. ERISA does not provide a specific statute of limitation for actions alleging violations of § 1140. The applicable enforcement provision for § 1140 actions, ERISA § 1132, does not contain a specific statute of limitation. Accordingly, the appropriate period is determined by reference to the state statute of limitations covering cases most analogous to the cause of action asserted by Plaintiffs. *See, e.g., Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994); *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

> be shown to have been understood by a large handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Justice Scalia, concurring in part).

G. Petitioner's Approach Would Leave Participants Or Beneficiaries Unable To Sue Under § 1451, Although Congress Expressly Allowed Them To Do So.

29 U.S.C. § 1451(a)(1) provides:

> A plan fiduciary, employer, plan participant or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief or both.

Section 1451(a) expressly authorizes adversely affected participants, beneficiaries or the labor organizations that represent them to bring an action over the omission of a trustee under Subtitle E of the Act, which deals with special provisions for multiemployer plans. The failure of trustees to assess withdrawal liability of a withdrawn employer, or to seek to enforce collection of the assessed liability, would constitute an omission adversely affecting a participant or beneficiary and upon which such participant or beneficiary, or a labor organization that represents them, could maintain an action.

However, a participant, beneficiary, or representative labor organization would not be able to maintain an action against plan trustees for such a failure under Petitioner's theory of the

commencement of the running of the statute. The cause of action would never accrue for such individuals or entities because, according to Petitioner, there would have been no assessment of liability or demand for payment. As no cause of action had accrued for them, they would have no right to sue. Although Petitioner will argue that the individuals could sue for breach of fiduciary duty under § 1113, Congress also expressly allows them to maintain action under § 1451 which they would be precluded from doing should Petitioner's theory prevail.

H. Petitioner's Contention That Installments Unpaid After Six Years From Withdrawal Would Be Uncollectible Is In Error.

Both Petitioner and the Solicitor General in its amicus brief maintain that the rule stating that the statute of limitations begins at the time of withdrawal would prevent a plan sponsor from collecting withdrawal liability after six years, and that a plan that received timely payments for six years would be time-barred from maintaining a collections action after that.

Respondents submit that such a contention is in error. Both the Petitioner and the Solicitor General have failed to take into account § 1451(b) which provides:

> In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

The aim of this statutory provision is to require withdrawing employers who are making regular withdrawal liability payments to continue paying. 29 U.S.C. § 1145, which is incorporated by reference in this section, governs "Delinquent Contributions." Thus, according to this statutory scheme, if an employer has commenced making individual withdrawal liability payments but then stops doing so (even after six years from withdrawal have passed), the trust fund would then be able to institute an action for missed payments under § 1145. Once an employer began making payments,

and then missed a payment, that would be treated as a missed contribution within the meaning of § 1145 and the applicable statute of limitations for delinquent pension contributions would apply.[13] Hence, a trust fund cannot be said to be remediless if an employer stops making withdrawal liability payments after six years from the time it withdrew.

A trust fund would be precluded from bringing a collection action more than six years after withdrawal only if an employer never, as here, made any withdrawal liability payments. In that case, where the employer totally rejected the demand for payment, it would be incumbent on a fund to initiate a collection action within six years from the date of withdrawal. That is an entirely different situation from that where an employer has made at least one or more payments. In the former case, a nonpaying employer has not agreed to participate in the process of liability imposition and payment schedule instituted by the trust fund, while in the latter, an employer, by paying, has agreed to the imposition and scheduling process[14] instituted by the fund. In the situation where no payment is made, the employer would be subject to a suit for collection of the entire amount within six years from withdrawal. An employer who agreed to the process by commencing payment, on the other hand, would find itself subject to court action for missed payments under § 1145.[15]

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13. The applicable statute of limitation in those instances would be the applicable state statute of limitations for breach of written contract. *Jumbo Markets*, 906 F.2d at 1372.

14. A paying employer would not necessarily be agreeing that the amount and payment schedule were correct, and could still challenge any determination of the fund in arbitration. It would, however, be agreeing to the collection process, creating a new, contractual obligation to pay off the liability. A fund would have a separate claim on this obligation with a separate statute of limitations.

15. Respondents' interpretation of § 1451(b) as applying to situations where an employer starts making payments, but then ceases, is consistent with the statutory scheme. If it applies to all missed withdrawal payments, including the first one, there would be no purpose in having a separate statute of limitations provision — § 1451(f).

I. Petitioner's Assertion That The Date Of Withdrawal May, In Some Instances, Be Retroactively Determined Is Not Controlling.

Both Petitioner and the Solicitor General contend that the date of withdrawal is an improper starting time, as that date can only be determined retroactively in certain instances.[16] It pointed out that there are special rules for the construction, entertainment, and trucking industries, that the issue of a controlled group poses uncertainty of withdrawal, and that it may not be determined until a subsequent date that the cessation of contributions during a labor dispute was, in fact, permanent.

Petitioner and the Solicitor General do not depict the construction and entertainment industry situations accurately. If an employer therein ceases making contributions and continues performing work in the jurisdiction, it has withdrawn at that point and no retroactive determination of withdrawal is necessary. If it resumes the performance of work in the jurisdiction within five years without restarting contributions, the conditions for complete withdrawal (and hence the accrual of the cause of action) are met at that time. The three-year statute of limitations under (f)(2) will, in the latter instance, not begin to run until the trust fund knows of the resumption of covered work; and, hence, the issue of retroactive determination of withdrawal becomes irrelevant.

In the trucking industry, although under § 1383(d)(4) the PBGC may not determine for five years after contributions or operations cease that a bonded trucking industry employer has withdrawn (with resulting substantial damage to the contribution base of the plan), the complete conditions for withdrawal are then met when the PBGC makes its determination. The statute of limitations begins to run from the time that the trust fund becomes aware of the PBGC's determination.

With regard to controlled groups, the statute begins to run at the time the plan is adversely affected, not when it ascertains whom

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16. Conspicuously absent from their briefs is any discussion of the facts in this case. In this case, the Trust Fund has admitted it knew Respondent withdrew in March 1985. J.A. 8, 23, 27, 46.

the proper defendant might be. Six years should be ample time for a trust fund to ascertain whether an employer is a member of a controlled group that has withdrawn. *Navco*, 3 F.3d at 171-2.

Finally, in collective bargaining situations, a fund would know within six years whether a cessation of contributions at impasse was permanent. If the bona fides of an impasse is questioned, a union has 180 days to file an unfair labor charge with the NLRB, and a decision on that charge would be decided well within the six-year period.

II. 29 U.S.C. § 1451(f) DOES NOT PROVIDE FOR A 26-YEAR STATUTE OF LIMITATIONS.

Petitioner and the Solicitor General argue that each of the payments found in the Plan sponsor's 20-year withdrawal liability schedule itself contains its own six-year statute of limitations. There is, of course, nothing in 29 U.S.C. § 1451(f) nor in MPPAA's legislative history that hints at this interpretation. More importantly, according to the Trust Fund's theory, the 20-year statutory payment schedule would give the Trust Fund 26 years from the date of the first missed payment before it had to sue on the last missed payment. In *Navco*, the District Court observed: "Fashioning a rule that would lead to such an absurd result is entirely at odds with the purpose of a six-year statute of limitations, and we decline to do so." *Chicago Truck Drivers Pension Fund v. Van Vorst Ind.*, 800 F. Supp. 587, 592 (N.D. Ill. 1992).

In *Navco*, Judge Easterbrook, writing for the Seventh Circuit, specifically rejected Petitioner's contention that the § 1451 contemplated a 26-year time period:

> Judge Plunkett concluded that a pension fund's power to accelerate future installments once the employer misses a payment, 29 U.S.C. § 1399(c)(5); 29 C.F.R. § 2644.4, means that the whole sum becomes due, and the whole claim accrues, when the first payment is missed. This is the right conclusion, but we put it somewhat differently. [T]he pension fund had only one claim against the employer (and, derivatively, against the controlling persons): the amount of

> withdrawal liability. Although a fund may permit an employer to amortize the sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset. Section 1391 calls on the pension plan to determine an amount that is owed; the financing options under section 1399(c) do not break the single debt into little pieces with their own statutes of limitations. . . . Turning six years into twenty-six is a job best left to magicians. . . .
>
> The trustee's obligation to act with dispatch distinguishes debts under ERISA from ordinary contractual debts, in which the debtor and creditor may agree on their own schedule — and in which, therefore, courts often say that there is no duty to accelerate and that each unpaid installment is a new claim. [Citations omitted.] The schedule under section 1399(c), by contrast, is not contractual; the employer did not assent to a longer period for payment and suit. We have not seen any case extending the contractual approach to the MPPAA, and like the district court we believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

3 F.3d at 172-173.

The *Navco* court held that when a fund and an employer cannot even agree on the existence of a contract, a fund has six years during which it can act in whatever manner it wishes — to sue on payments due, to accelerate, or, as in this case, do nothing — but it only has six years. After that date, the fund has lost its right to recover any withdrawal liability. This view has support even among amici that endorse Petitioner. Midwest Motor Freight, Inc., arguing against the Ninth Circuit's holding below, but in favor of adoption of the *Navco* decision that the statute begins to run from the time the trust missed payment for the entire amount of withdrawal liability, contends that the approach of *Navco* "hardly makes mandatory what is optional under the statute. If a pension plan wishes to

rehabilitate the delinquent employer it may do so, but it must sue for the entire amount of withdrawal liability within six years. This is hardly draconian; . . . " (Brief for Midwest Motor Freight as amicus curiae at 12).

The argument presented by the Petitioner and adopted by the Third Circuit in *Kahle*, that a decision supporting *Navco* would deprive the fund of flexibility it needs to recover debts, rings hollow in this context. In its brief, the Petitioner essentially argues that the Congressional intent and the law of contracts grant the fund the "flexibility" to sue this employer more than one time in an effort to recover liability. This Court has frequently expressed dissatisfaction with rules that would encourage an unnecessary multiplicity of actions, especially in cases when Congressional intent to allow such suits is lacking. *See, e.g. Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351-52 (1983) (also noting that the purpose of statutes of limitations is to put defendants on notice of claims and "to prevent plaintiffs from sleeping on their rights"); *Southern Construction Co., Inc. v. Pickard*, 371 U.S. 57, 60 (1962); *Klehr v. A.O. Smith Corp.*, __ U.S. __, 117 S. Ct. 1984, 1989 (1997) (wherein the court refused to adopt the "last predicate act" rule for the RICO statute of limitations. The Court held that such an interpretation lengthens the limitations period dramatically and thus conflicts with a basic objective underlying a limitations period — repose.)

Judge Alarcon also answers this argument in *Kahle*, arguing in dissent:

> I would not borrow from the law of contracts to negate the intent of Congress that pension funds must act promptly to avoid the compromising the financial integrity of the pension fund and requiring other participants to shoulder the responsibility of employers who withdraw.

Kahle, 43 F.3d at 869. Clearly, assuming a twenty year payment plan, adopting the majority view in *Kahle* would allow a fund to dawdle as occurred here, with the possibility that the fund could wait twenty years, yet recover almost a third of the withdrawal liability presumably owed it. Other employer-

members of the fund would likely be eventually forced to share the burden created due to the fund's lack of diligence. The answer offered by the majority in the *Kahle* decision itself — that the risk of forfeited payments is enough of a disincentive — clearly was not true in either that decision or the instant case, and, again, lost funds are not a consolation to the plan's participants or to the other employer-members of the fund.

One of Petitioner's and the Solicitor General's central arguments in support of their proposition that there is a separate statute of limitations for each payment is that there is a specific default and acceleration mechanism in the statute. However, their argument is based on the faulty assumption that the Fund did not accelerate in this case when in fact it clearly did so.[17] (*See* First, Second, and Third Claims of Complaint.) Hence, under the governing facts of this case, Petitioner may not rely on the argument that the potential for acceleration implies that separate monthly payments bring separate statutes of limitations.

In any event, this is a false argument as it is based on Petitioner's premise that the cause of action does not arise at the time of withdrawal. Now it is claiming that the running of the statute is put off even further than the time of the first missed payment — until after it decides to accelerate. This is just a further example of a plaintiff's effort to unilaterally control the running of the statute.

Finally, the Solicitor General argues that even if the Fund had accelerated, the suit would have been timely as it was filed within 6 years from 60 days after Respondent received Petitioner's April 14, 1997 notice. (Brief of Solicitor General, p. 25, n. 20.) However, the statute which describes acceleration as the means for

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17. Petitioner's argument as to when a cause of action would accrue with regard to the accelerated balance of payments is particularly confusing. Petitioner's Complaint alleges, citing 29 U.S.C. § 1399(c)(5), that the Respondent has defaulted and that the entire sum for withdrawal liability is due. J.A. 9, ¶ 17. This allegation is incorporated within every claim of Petitioner's Complaint. Therefore, the contention of Petitioner and amici that acceleration has not occurred is not consistent with the Complaint. What this also means is that the Fund, in this case, cannot claim that it has never been effectively forced into seeking the entire amount of withdrawal liability, since it obviously did so.

curing default, § 1399(c)(5), clearly implies that the claim for accelerated payment of the entire amount would run from the date of the first missed payment:

> In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability *from the due date of the first payment which was not timely made.* (Emphasis supplied.)

Since the statute requires that interest run from the date of the first missed payment where the debt has been accelerated, so should the limitations period for an action on the accelerated amount.[18]

Petitioner's interpretation would require a wholesale reconfiguration of the statute of limitations. There is no mention of this 20-year recovery period in 29 U.S.C. § 1451(f). To insert this requirement in § 1451 would work a kind of linguistic havoc. Section 1451's detail, its description of both procedural and substantive forms, and its explicit listing of exceptions, taken together, clearly indicate that Congress did not intend for the courts to read an unmentioned, open-ended 20-year exception into a statute that is so carefully drafted.

The absurdity of Petitioner's interpretation is best shown through the facts of this case. According to Petitioner, although it sat on its rights to collect withdrawal liability for almost eight years, it claims to have been out of pocket only one monthly payment of $345.50 at the time it filed suit. It seems incredibly strange that Congress could have intended this result when it drafted 29 U.S.C. § 1451(f)(1) which simply calls for a six-year limitation period.

18. *Cf.* Internal Revenue Code § 6601(e) which provides that interest on an underpayment of any tax is treated in the same manner as the tax. Moreover, the limitation on the assessment and collection of interest is for the same time period under which the tax may be assessed and collected. § 6601(g).

A. The Application Of Petitioner's "Continuing Violation" Theory Founders On The Plain Language Of 29 U.S.C. § 1451(f)(2).

Section 1451(f) provides that a plaintiff must bring a claim after the later of 6 years after the date on which the claim arose, or three years after the "earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." In *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992), a large number of Trans-Alaska pipeline workers sued for pension benefits. In rejecting the plaintiff's "continuing violation" theory, the Ninth Circuit explained:

> [T]his section [§ 1113(a)(2)] requires the plaintiffs' knowledge to be measured from the "earliest date" on which he or she knew of the breach. While the trustee's conduct may be viewed as a series of breaches, all were of the same character: a failure to amend vesting rules. Once a plaintiff knew of one breach, an awareness of later breaches would impart nothing materially new. . . . The earliest date on which a plaintiff became aware of any breach would thus start the limitation period of section 1113(a)(2) running. The district court's application of the continuing violation theory essentially reads the "actual knowledge" standard out of the statute.

944 F.2d at 520.[19] *Accord, Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996) (applied to an ERISA claim

19. Judge O'Scannlain explained in concurring:

> If the "continuing violation" rationale that we have applied in other contexts were as broad as the plaintiffs in the district court suggest, the "actual knowledge" provision in the statute would be superfluous and virtually no breach would ever grow stale so long as it remained unremedied. The plaintiffs in the district court have confused the failure to remedy the alleged breach of an obligation with a commission of an alleged second breach, which, as an overt act of its own, recommences the limitations period.

944 F.2d at 522-523.

for benefits). Here, the "earliest date on which the plaintiff acquired or should have acquired knowledge of the existence" of the withdrawal (March 1985) would start the limitation period of § 1451(f) running.

B. The Solicitor General's Analogy To § 1451(b) Is Misplaced.

In support of its position, the Solicitor General cites *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987), for the proposition that, if an employer fails to make monthly contributions to a multiemployer plan under 29 U.S.C. § 1145, the limitations period runs against each monthly right of action separately. Based on this he argues that any missed installment payment constitutes a separate violation of the Act. (Brief for Solicitor General at 23-24).

According to the Solicitor General, "the same [six year] limitations rule should apply to delinquent contributions and delinquent payment of scheduled withdrawal liability installments." (Brief for Solicitor General at 24, n. 17.) Section 1451(b) of the MPPAA, however, provides that in any action "to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title)." 29 U.S.C. § 1451(b).

There are several difficulties within the Solicitor General's analysis. First of all, the Solicitor General's reliance on *Ferrell* is misplaced. *Ferrell*, like *Jumbo Markets*, simply holds that delinquent contribution cases are contractual in nature, and, because § 1145 does not contain its own statute of limitations, the most analogous state statute of limitations is to be borrowed. *Ferrell*, 812 F.2d at 517. In the instant case, Respondent never agreed to the schedule of payments so the contractual analogy as expressed in *Ferrell* is inapplicable. Secondly, as explained *supra*, actions for delinquent contributions are subject to the applicable state statute of limitations for written contracts, so the "limitations rules" as described by the Solicitor General in its brief are not identical.

Third, the Solicitor General ignores the statutory context. Section 1451(a) describes who can bring claims under subtitle E. Section 1451(b) then describes what happens when things go wrong under normal circumstances — that is, where an employer begins to make withdrawal liability payments and then stops, it shall be treated as a delinquent contribution under § 1145.

C. Withdrawal Liability Is Not An Installment Obligation As Petitioner And The Solicitor General Suggest.

Petitioner and the Solicitor General refers to installment obligations in arguing that a separate cause of action exists for each payment of an obligation which has not been accelerated. However, Respondent cannot be said to have given its assent to the schedule of payments or entered into any sort of contractual arrangement. Petitioner presented the Respondent with a bill for the full amount of withdrawal liability, and stated that the employer could either pay the full amount or amortize payments across a 20 year schedule. J.A. 23-24. The employer did not pay the full amount, nor did it make its first monthly payment, nor has it made any monthly payment to date. J.A. 46, ¶¶ 7, 9. In fact, it twice challenged the very existence of any liability at all to the fund by requesting review and initiating arbitration. J.A. 31-34, 37.

As the Ninth Circuit pointed out below, "Ferbar never agreed to the installment plan proposed by the fund and made no installment payments. As a result, it appears that no new contract to pay off the withdrawal liability could have been formed. *See* 1A Arthur L. Corbin, Corbin on Contracts § 211 (1963). Had such a contract been formed, the Fund might have a separate claim, with its own statute of limitations, for breach of that contract." (emphasis supplied). Pet. App. 5a, n.4. This rationale is the thrust of Judge Easterbrook's opinion in Navco as well: "The [payment] schedule under § 1399(c), by contrast, is *not* contractual; the employer did *not* assent to a longer period for payment and suit." *Navco*, 3 F.3d at 172. The facts of the instant case support the Navco and Ninth Circuit theories.

Petitioner and the Solicitor General also argue that even though Ferbar never made any payments of any kind and even though the

trust fund sued to accelerate the total amount of the debt, the underlying "command" of the statute is to pay withdrawal liability debt in equal installments. According to Petitioner (and the Solicitor General), this purported underlying statutory command to make installment payments is the deus ex machina that saves its own time-barred claim.[20] However, as noted *supra*, an employer is given the option to pay in installments or a lump sum. 29 U.S.C. §§ 1399(c)(2) and 1399(c)(4). Thus installment payments are not "commanded" by the statute. In fact, Petitioner repeatedly advised Respondents that they had this option. This is a false argument, in any event, under the circumstances of this case when the employer has not made any payments and the Petitioner has sued for the entire amount.

Justice Breyer, writing for a unanimous Supreme Court, in *Jos. Schlitz*, observed that a withdrawal liability payment:

> looks more like a tax or purchase-money installment than a loan installment. . . . In fact, the withdrawing employer cannot determine, or pay, the amount of its debt until the plan has calculated that amount — which must take place sometime after the beginning of the withdrawal year. All these features make it difficult to find any analogy in withdrawal liability to a loan.

115 S. Ct. at 988.

A "tax" is defined by Black's Law Dictionary as:

> [A] pecuniary burden laid upon individuals or property to support the government, and is payment exacted by legislative authority. [citation omitted]. Essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. *In re Mytinger*, 31 F. Supp. 977, 978 (D.C. Tex. 1940).

Black's Law Dictionary, 6th ed. (1990), p. 1457. Even should monthly payments of withdrawal liability be deemed commanded by statute, that would not cause them to be divested of their characteristic of a tax and rendered akin to an installment obligation.

D. Petitioner's Interpretation Of 29 U.S.C. § 1451 Would Upset The Balance Between The Regulation Of Employee Benefit Plans And The Costs Of Compliance.

"There is a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, 508 U.S. at 262 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)); [bracketed material added by the Court]. Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *Alessi, supra*, 451 U.S. at 515. This balance is fundamental to ERISA's remedial scheme. This Court has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens*, 508 U.S. 248 (1993) (holding that ERISA § 502(a)(3) does not authorize an action for money damages against a nonfiduciary who allegedly participated in the plan fiduciary's wrongdoing); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA § 409(a) does not authorize an action by a plan participant for extra-contractual damages).

20. The authority cited by the Solicitor General for the proposition that this lack of assent to a contract on the part of Respondent is not controlling proves quite the opposite. The Solicitor General cites *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981) for the proposition that the imposition of a statutory scheme creating the option of paying off a debt in installment payments creates a statute of limitations for each installment. (Brief for Solicitor General at 24 n.18.) The court in *Waggoner* went to great lengths to emphasize how the employer's obligation to make installment payments arose out of a contractual obligation because the Labor Management Relations Act required the same (and required the agreement to make installment payments to be in writing). Section 302(c)(5) of the LMRA, permits employer contributions to employee welfare trust funds, but requires that "the detailed policy on which such payments are to be made" be "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5). Similarly, the District Court in *Davis v. Alabama Power Co.*, 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir. 1976), *aff'd*, 431 U.S. 581 (1977), also cited by the Solicitor General for this same proposition, when examining how the statute of limitations should apply to a plaintiff who was attempting to recover pension payments allegedly due him, held that "the collective bargaining agreement covering the plaintiff at the time of his retirement included the pension plan *as a matter of contract and hence the pension plan was part of his contract of employment.*" (emphasis supplied) *Davis*, 383 F. Supp. at 893. The District Court then applied Alabama's statute of limitations for written contracts to the incomplete argument plaintiff's claim. *Id.*

Petitioner attempts to bolster its assertion that the statute of limitations of MPPAA runs for up to twenty-six years by alluding to MPPAA's purposes as being "to provide a mechanism for preserving the long-term financial integrity of multiemployer plans in the face of such employer turnover." *Petitioner's Brief* at p. 16. In *Mertens*, the Supreme Court concluded:

> [V]ague notions of a statutes "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. *See PBGC v. LTV Corp.*, 496 U.S. 633, 646-647 (1990). This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs. *See, e.g., Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54-56 (1987).

508 U.S. at 261-262.

Petitioner's "borrowing" of selected parts of § 1399 to extend the limitations period for up to 26 years would establish a new remedy that Congress did not expressly provide. The almost never-ending liability for withdrawing from a multiemployer plan would be viewed by employers as an additional liability. Although Petitioner's theory would appear to financially benefit dilatory trust funds, the further relaxation of collection efforts would have quite the opposite effect. The trust fund's financial health would be further undermined because this new and costly remedy would also serve to discourage new employers from participating in multiemployer pension plans. As this Court ruled in *Massachusetts Mutual Life Insurance Company v. Russell*:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 1119 (1979): "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it". *See also, Touche Ross & Company v. Redington*, 442 U.S. 560, 571-574 (1979). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 97. [footnote omitted]

473 U.S. at 148.

E. Petitioner's Proposed Enforcement Mechanism Does Not Work.

Petitioner's Brief concludes with a description of its own enforcement mechanism (in the absence of a beginning date for the statute of limitations). Petitioner's enforcement mechanism consists of: (1) a self-inflicted wound; (2) an open invitation to litigation; and (3) a betrayal without remedy. The purported enforcement by the "self-inflicted wound" consists of the fact that the Trust Fund asserts it will be spurred into action because it will lose interest by failing to make a timely assessment. Petitioner's Brief at 39. Petitioner, of course, ignores the fact that in this case it waited almost two years to assess the Respondents. However, the real economic injury is the potential loss of the entire withdrawal liability assessment which may be lost if the Trust Fund fails to timely protect its rights.

The "invitation to additional litigation" derives from Petitioner's suggestion that an employer, "prejudiced" by the plan sponsor's failure to demand payment of withdrawal liability "as soon as practicable (§ 1391(b)(1)) can raise that failure as a defense in arbitration to the assessment of withdrawal liability." Petitioner's Brief at p. 40. The term "practicable", according to Petitioner, will have to be defined through litigation.

Finally, Petitioner suggests that dilatory trustees "who failed to perform their statutory duty may invite claims for breach of fiduciary duty" from unhappy participants. Petitioner's Brief at p. 40. This is a "betrayal without remedy" because, if Petitioner's position is sustained, the Plan's participants will have no claim against the Plan's trustees until the trustees get around to making a withdrawal liability demand. In addition, the dilatory trustees would undoubtedly raise the statute of limitations under 29 U.S.C. § 1113

(the earlier of three years from actual knowledge or six years from the date the claim arose) to bar the participants claim.

In short, because Petitioner's enforcement mechanism is impractical, would invite additional litigation and would provide no meaningful remedy for harmed participants, it must be rejected.

CONCLUSION

For the foregoing reasons, the judgment below should be sustained.

Respectfully submitted,

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